Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-899

EVERETT A. McCOLLUM and
IRVIN RAY CRIST,

Petitioners,

v.

DONALD W. STAHL, IN HIS CAPACITY AS
SHERIFF OF MECKLENBURG COUNTY AND
INDIVIDUALLY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	8
1. Resubmission of an inconsistent special verdict is permitted by the Rules of Civil Procedure . . .	10
2. Remand for a new trial is the proper action where no clear verdict is returned by the jury . .	16
3. A peremptory instruction on the McCollum liability issue was consistent with the evidence and with this Court's decision in Elrod v. Burns, 427 U.S. 347, 49 L.Ed.2d 547 (1976)	20
Conclusion	28
Appendix A - Opinion of the U.S. Court of Appeals for the Fourth Circuit .	A1
Appendix B - Judgment of the U.S. District Court for the Western District of North Carolina	B1
Appendix C - North Carolina General Statutes §163-271	C1

CITATIONS

Cases Page

Aetna Casualty and Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941) 18

Atlantic and Gulf Stevedores v. Ellerman Lines, 269 U.S. 355, 7L.Ed.2d 798 (1962) 10

Atlantic Tubing and Rubber Co. v. International Engraving Co., 528 F.2d 1272 (1st Cir. 1976) 17, 20

Bernardini v. Rederi A/B Saturnus, 512 F.2d 660 (2d Cir. 1975) 19

Board of Education v. Barnette, 319 U.S. 624, 87 L.Ed. 1628 (1943) 24

Elrod v. Burns, 427 U.S. 347, 49 L.Ed2d 547 (1976) 20, 21, 25, 27

Fugitt v. Jones, 549 F.2d 1001 (5th Cir. 1977) 15

Griffin v. Matherne, 471 F.2d 911 (5th Cir. 1973) 13

Janetta v. Cole, 493 F.2d 1334 (4th Cir. 1974) 27

McVey v. Phillips Petroleum Co, 288 F.2d 53 (5th Cir. 1961) 11

Miller v. Royal Netherlands Steamship Company, 508 F.2d 1103 (5th Cir. 1975) . 17

Page

Morrison v. Frito-Lay, Inc., 546 F.2d 154, (5th Cir. 1977) reh. denied (1977) . 13, 14

Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.2d 570 (1972) 27

Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed.2d 811 (1968) . . 27

R. B. Company v. Aetna Insurance Co., 299 F.2d 753 (5th Cir. 1962) 11, 17

Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506 (1964) 24

Turchio v. D/S A/S Den Norske Africa, 509 F.2d 101 (2d Cir. 1974) 19

STATUTES AND MISCELLANEOUS

North Carolina General Statutes §153A-104 22

North Carolina General Statutes §163-271 . . . . . 4, C1

Rule 49(a), Federal Rules of Civil Procedure . . . 2, 5, 8, 10, 11, 13, 14, 17

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SHERIFF OF MECKLENBURG COUNTY AND
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Everett A. McCollum and Irvin Ray Crist respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on July 19, 1978.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 579 F.2d 869 (1978) and is printed in Appendix A to this petition. The judgment of the United States District Court for the Western District of North Carolina, Charlotte Division, upon verdict of a jury, is not published but is printed in Appendix B, hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 19, 1978. A timely petition for a rehearing en banc was denied on September 8, 1978, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the resubmission of an inconsistent jury verdict is procedurally and legally correct under Rule 49(a) of the Federal Rules of Civil Procedure, as interpreted by the United States Court of Appeals for the Fourth Circuit.

2. Whether the standard for review of the action of the District Court in resubmitting an inconsistent jury verdict is based upon a showing of error or clear abuse of discretion.

3. Whether the decision in Elrod v. Burns, 427 U.S. 347, 49 L.Ed.2d 547 (1976) prohibits the giving of a peremptory instruction on the issue of liability in the context of a claim for intentional infringement of Constituional rights where all the evidence supports such claim.

STATEMENT OF THE CASE

Petitioners are former deputies of the Mecklenburg County, North Carolina, Sheriff's Department. Respondent Stahl was at the time of the events giving rise to this action the Sheriff of Mecklenburg County. Petitioners sued Stahl on November 20, 1974 for money damages alleging violations of their Constitutional rights by the Sheriff incidental to the discharge of the two deputies on November 5, 1974. Petitioners invoked the jurisdiction of the District

Court under the provisions of 42 U.S.C. §1983 and §1988 and asserted pendent jurisdiction of a claim asserted under North Carolina General Statutes §163-271, the Voter Intimidation Act.

Evidence adduced during four days of trial before a jury tended to show that McCollum was fired from his job as Deputy Sheriff on November 5, 1974, upon his admission to Stahl that he had not voted for the Sheriff in a local election held on the preceding day. Stahl testified that he felt McCollum's action was an expression of disloyalty, and that if McCollum had said he had voted for the Sheriff, he would not have been discharged. Crist was terminated shortly thereafter when he went to the Sheriff's office to advise Stahl that McCollum's discharge constituted a violation of the Voter Intimidation Act of North Carolina (N.C.G.S. §163-271, Appendix C hereto).

Crist testified that his attempt to talk to Stahl concerning McCollum was within the exercise of his lawful duties as Deputy Sheriff and as a concerned citizen. Stahl was ultimately convicted

of violating N.C.G.S. §163-271 in respect to the firing of Petitioner McCollum, was fined $500 and was ordered to reinstate McCollum with back pay to the date of his termination. McCollum worked approximately 14 months more with the Sheriff's Department before taking other employment; Crist was never reinstated after his discharge.

The District Court submitted four separate issues to the jury as to each plaintiff, under the provisions of Rule 49(a) of the Federal Rules of Civil Procedure. The form of these issues was as follows:

1. Did the defendant wrongfully discharge:
   (a) The plaintiff McCollum?
   ANSWER:
   (b) The plaintiff Crist?
   ANSWER:

2. If so, what amount of damages therefor should the defendant pay:
   (a) To the plaintiff McCollum?
   ANSWER:
   (b) To the plaintiff Crist?
   ANSWER:

3. Was the discharge of either or both the plaintiffs maliciously, wantonly or oppressively done:
   (a) As to the plaintiff McCollum?
   ANSWER:
   (b) As to the plaintiff Crist?
   ANSWER:

4. If so, what amount, if any, should the Defendant pay as punitive damages:
   (a) To the plaintiff McCollum?
   ANSWER:
   (b) To the plaintiff Crist?
   ANSWER:

The District Court granted McCollum's motion for a peremptory instruction on the first issue relating to wrongful discharge after concluding that all of the evidence showed that McCollum was fired because of the way he had voted, and because the Sheriff had not offered any defense to this claim.

At the conclusion of its deliberations, the jury returned a verdict as to McCollum answering "Yes" to issues numbered 1 and 3, and fixing actual damages of $50,000.00 and punitive damages of $15,000.00. The

original verdict as to Crist indicated a "No" answer to the first issue, left blank the space for actual damages, but found that the discharge of Crist by Stahl was maliciously, wantonly or oppressively done, and awarded $15,000.00 in punitive damages.

The District Court accepted the McCollum verdict but interpreted the jury's answers concerning Crist to be inconsistent, and therefore resubmitted those issues to the jury for further consideration with clarifying instructions on the criteria for awarding actual and/or punitive damages which the District Court admitted it had failed to give at the time of the initial instructions to the jury. Counsel for Stahl had timely moved for judgment on the verdict as to Crist and resisted the resubmission of those issues to the jury. The jury's second effort yielded a "Yes" response to issues numbered 1 and 3 and awarded Crist actual and punitive damages in the amounts of $3,750.00 each.

The District Court entered its judgment upon the jury verdict on October 19, 1976. (Appendix B). Stahl appealed to the United States Court of Appeals for the

Fourth Circuit on numerous grounds. On July 19, 1978, a panel of that Court issued its opinion which reversed the District Court judgment. The Appeals Court's decision vacated the Crist verdict and entered judgment for Stahl for the reason that the original verdict rendered by the jury was, in that Court's opinion, a final and conclusive judgment and resubmission was improper. The McCollum verdict was vacated and that portion of the case was remanded for a new trial on account of the District Court's error in giving a peremptory instruction of the primary liability issue.

Petitioners' timely petition for rehearing en banc was denied by the Court of Appeals for the Fourth Circuit on September 8, 1978.

REASONS FOR GRANTING THE WRIT

In the situation where the jury of a federal trial court is requested to return a special verdict under the procedure of Rule 49(a), the proper handling of the form and substance of that verdict is of critical importance to the litigants themselves as well as to the continuing

integrity of the entire federal jury system. Where an inconsistent or unclear verdict is returned, the District Courts must be assured of their right and responsibility to attempt a resolution at that level which will promote judicial efficiency and also give credence to the intent of the jury which heard the evidence. A substantial part of the decision by the Appeals Court in this case relied for its authority on a case from another Circuit which upon analysis does not support the conclusion reached herein, and which has been significantly modified by a later decision from that same Circuit. The precedent of the Crist decision will adversely affect the rights of future litigants where the special verdict procedure is employed. The decision of the Appeals Court subverts the clear intent of a rule of federal civil procedure and emasculates the discretion of the District Courts of this Circuit in administering an important feature of federal trial practice. The question of the propriety of the peremptory instruction in the McCollum case mandates action by the Supreme Court of the United States affirming the principle that clear-cut

violations of a citizen's civil rights shall not be permitted, where evidence of such violation is undisputed by the responsible party.

POINT 1

Resubmission of an inconsistent special verdict is permitted by the Rules of Civil Procedure.

Petitioners contend that the Court of Appeals incorrectly interpreted the language of Rule 49(a) of the Federal Rules of Civil Procedure in the context of the original Crist verdict and its resubmission by the District Court. Petitioners acknowledge that the consideration of the jury verdict is subject to Constitutional restraint and that "the Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly." Atlantic and Gulf Stevedores v. Ellerman Lines, 269 U.S. 355, 364, 7 L.Ed.2d 798, 806-807 (1962). There is simply no way to realistically harmonize a jury verdict finding

no wrongful discharge which simultaneously brands that discharge "malicious, oppressive and wanton" when the claim is based upon an intentional deprivation of Crist's rights to free speech and due process. The answers as first given by the jury were patently inconsistent. They cannot be seen to "...represent a logical and probable decision on the relevant issues as submitted...," R.B. Company v. Aetna Insurance Company, 299 F.2d 753, 760 (5th Cir. 1962), and thus an irreconcilable conflict arose at the conclusion of the jury's first deliverations.

The special verdict must be construed in light of the surrounding circumstances, including the trial court's instructions. McVey v. Phillips Petroleum Company, 288 F.2d 53 (5th Cir. 1961). The text of Rule 49(a) under which the liability issues were initially submitted requires the District Court to "...give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." At trial the District Court expressed concern over the lack of

clarity in its instructions to the jury prior to sending the panel to the jury room for deliberation. Upon receiving the first troublesome verdict, the trial court admitted it had failed to instruct the jury that it should not answer subsequent issues if it answered "no" to the first issue: "This situation is complicated somewhat by the fact that I do not recall telling the jury that they should stop if, as to any plaintiff, they answered the first issue no. I should have told them that." (Appendix in Court of Appeals, p. 377).

Having expended four days on trial, the District Court faced the dilemma of needing to reconcile conflicting answers to the two basic liability issues presented in the lawsuit. The finding of the Appeals Court was that "...the remand of the [Crist] questions to the jury was tantamount, in its effect, to a direction to the jury to find liability in order to warrant the award of damages." 579 F.2d at 872. On the contrary, the additional instructions given by the trial court made absolutely clear that if the jury verdict on the first issue was "no" then the jury should halt its

deliberations without reaching the other issues. The court made clear that it was not instructing the jury to change any one particular issue but only that its original answers to issues 1, 3 and 4 were inconsistent. (Appendix, pp. 384-386).

The Court of Appeals disapproved the resubmission for the reason that such procedure, it said, was not contemplated by Rule 49(a). The Court cited as authority for this holding a footnote which appears in the 1973 Fifth Circuit decision Griffin v. Matherne, 471 F.2d 911 at 917, cited at 569 F.2d at 872. The plain language of the Griffin decision giving rise to that footnote is: "We pretermit the question of whether there could have been a valid resubmission to the jury." supra., at 917. Griffin is therefore dubious authority at best for the proposition advanced by the Fourth Circuit panel in this instance.

Petitioners contend that the viability of the decision by the Appeals Court is undermined completely by the more recent decision in Morrison v. Frito-Lay, Inc., 546 F.2d 154 (5th Cir. 1977) reh. denied (1977), out of the same Circuit as Griffin.

In Morrison, the Appeals Court unequivocally approved the resubmission to the jury of inconsistent answers in the context of Rule 49(a). The District Court there submitted, over objection by defendant's counsel, an additional special interrogatory to the jury after determining that an inherent inconsistency existed in answers to liability issues. The Appeals Court said:

> "Although Rule 49(a), F.R.C.P., does not refer to inconsistent findings, it is clear that in order for a verdict to stand the answers must be consistent and, if not consistent, on appeal the case must be remanded for a new trial.
>
> The Defendant-Appellants have correctly stated that Rule 49(a) makes no provision for the course to be followed in the event of inconsistent answers. However, we disagree with their contention that the District Court overstepped its authority. It would be anomalous to hold that, while a court pursuant to Rule 49(a) must search

> for a view of the case which will make the jury's answers consistent, it may not submit an additional interrogatory to the jury to clarify an ambiguity. The facts of this case do not require us to decide whether in every case of irreconcilable inconsistencies in answers to Rule 49(a) interrogatories the trial court is permitted to submit additional interrogatories to the jury to avoid declaring a new trial. We think that clearly, in its discretion, the trial court may submit one or more interrogatories to the jury for the purpose of harmonizing apparent inconsistencies or ambiguities when such harmonization and resolution of ambiguities might properly be performed by the court itself under the test of Griffin v. Matherne, 471 F.2d 911 (5th Cir. 1973)."
>
> 546 at 160-161.

Fugitt v. Jones, 549 F.2d 1001 (5th Cir. 1977) further affirms the rationale

adopted by the Fifth Circuit in Morrison.

The apparent authority of Griffin relied upon by the Fourth Circuit reversing the District Court judgment for Petitioner Crist has been severely modified by the very court which wrote the Griffin decision. To permit the disposition of the Crist judgment to remain unaltered at this juncture would serve to honor a rule without reason.

POINT II

Remand for a new trial is the proper action where no clear verdict is returned by the jury.

The action of the Appeals Court vacating judgment for Crist and granting judgment in favor of Respondent exceeds the permissable scope of review which has been established by the Fourth as well as other Circuit Courts in the federal system. Even assuming that resubmission of the liability issues to the jury by the District Court was improper, Petitioners contend that no final judgment could properly be entered on the face of the inconsistent answers

to interrogatories which were delivered to the trial court. If a logical reconciliation of divergent jury answers cannot be made, neither plaintiff nor defendant may claim judgment. Miller v. Royal Netherlands Steamship Company, 508 F.2d 1103 (5th Cir. 1975); R.B. Company v. Aetna Insurance Company, supra. The First, Second and Fourth Circuit Courts have previously held to the effect that the district trial courts are vested with broad discretionary power to refuse to accept an improper verdict and to order a new trial. In Atlantic Tubing and Rubber Co. v. International Engraving Co., 528 F.2d 1272 (1st Cir. 1976) the issue for appellate review was the propriety of an order for new trial by the District Court upon receipt by it of inconsistent answers to Rule 49(a) special interrogatories. That Court said:

> "Plaintiff suggests that this Court must exercise an independent judgment on the question of the consistency or unambiguous character of the jury's answers to the interrogatories, and, if we believe that the jury's responses

are not irreconcilably consistent, we must reverse and order the District Court to enter a judgment for plaintiff.

Although a trial court must be sensitive to the principles of Gallick and Atlantic and Gulf Stevedores, it has considerable discretion in applying them, and its refusal to enter judgment on the basis of a jury's answers to a set of interrogatories should not be reversed simply because an appellate court concludes that it is possible to reconcile the jury's responses. A federal trial court has broad discretion to refuse to accept the general verdict and to order a new trial when it believes that the ends of justice so require. See Aetna Casualty and Surety Co. v. Yeatts, 122 F.2d 350, 354 (4th Cir. 1941). This discretion encompasses the power to refuse to accept a jury's answers to special interrogatories. Hence this Court should reverse only if we find that the District Court abused its discretion in refusing to enter a judgment for

plaintiff."(Emphasis added).

528 at 1276.

The Second Circuit similarly has held that when special verdicts cannot be reconciled, the District Court may not enter judgment, and that the proper appellate remedy in such an instance is to remand for a new trial. Turchio v. D/S A/S Den Norske Africa, 509 F.2d 101 (2d Cir. 1974); accord, Bernardini v. Rederi A/B Saturnus, 512 F.2d 660 (2d Cir. 1975).

In considering the Crist judgment and the action taken by the District Court, the Appeals Court did not bottom its inquiry on whether the record showed any abuse of discretion by the District Court, and no such finding was made concerning the trial court's refusal to enter judgment for Stahl upon the return of the first verdict. The Fourth Circuit in its decision is basically substituting its own independent judgment on the issue of the consistency of the first responses tendered by the jury, as indicated by the statement, "At the time of the recommitment there was before the Court a decisive verdict, an unequivocal finding of

no wrongful conduct by Stahl." 579 F.2d at 873. This is precisely the kind of hindsight review which several other Circuit Courts of this country have found improper and undesirable. Atlantic Tubing and Rubber Co., supra.

If the District Court was mistaken in resubmitting the Crist issues to the jury, that simple error can best be remedied by a remand of that case for new trial together with McCollum. The intent of the jury in the Crist matter remains in doubt if the resubmission procedure is held improper and if judgment is entered for Stahl on the basis of the ambiguous interrogatory responses returned by the jury.

POINT III

A peremptory instruction on the McCollum liability issue was consistent with the evidence and with this Court's decision in Elrod v. Burns, 427 U.S. 347, 49 L.Ed.2d 547 (1976).

The Appeals Court held in its opinion that the District Court erred in not permitting the jury to consider a possible

defense available to Respondent based upon the peculiar circumstances of the position held by McCollum vis-a-vis the Sheriff, which relationship, the Court said, could justify a finding that the deputy was dischargeable at will, and that no liability would therefore attach. The analysis by the Court involved a determination that the decision of Elrod v. Burns, 427 U.S. 347, 49 L.Ed.2d 547 (1976) required that the trial court instruct the jury that if it found McCollum to be performing a policy-making[1] function as Deputy Sheriff, then the existence of such a relationship could justify on the part of the Sheriff an expectation of personal loyalty from his deputy, and that evidence of the breach of this duty of loyalty (i.e., by not voting for Stahl) could be

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[1] The Court engrafts a consideration of "confidential capacity" into the equation of Stahl and McCollum as a possible additional basis for the duty of personal loyalty, however that factor is not discussed in the Supreme Court's opinion in Elrod, and Petitioners reject the notion that such a fiduciary-type analysis has any place in this factual setting.

a legitimate basis for discharge. Petitioners understand the Appeals Court to have held that the quality of the purported alter ego relationship between Stahl and McCollum would, on the strength of that fact alone, permit the jury to exonerate the Sheriff if they believed that Stahl was motivated in his action by any one of several unspecified grounds, or for no reason at all[2] as an alternative to the evidence adduced by Petitioners that McCollum was fired on account of how he voted.

Petitioners contend that the Appeals Court misinterpreted the holding of Elrod, supra as it relates to the factual context of McCollum's discharge and the totality of evidence introduced at trial on that point as well as the nature of the

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[2] The Court cited North Carolina General Statutes §153A-104: "...(1) Each sheriff...elected by the people has the exclusive right to hire, discharge and supervise the employees in his office...." for the threshold authority of the Sheriff to do pretty much as he wished with respect to the staffing of his office.

position held by the deputy in Stahl's administration. The harm flowing from that misinterpretation is an improper remand of the McCollum case for new trial and the far more devastating establishment of precedent in this Circuit which does violence to the important constitutional principles with which Elrod dealt.

The undisputed evidence at trial was that Stahl discharged McCollum for one reason - because McCollum admitted that he had not voted for the Sheriff in the general election.[3] There was no evidence that McCollum was terminated as a result of any substantive conflict with the Sheriff or as punishment for a violation of departmental policy, for any other reason, or for no reason at all. Stahl's

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[3] Direct examination of Stahl at trial revealed:

> A. (Stahl) - "I asked Sam, I said, 'Sam, is it true you pulled a straight Democratic lever,' and he said, 'Yes, Sir,' and nodded his head and I told him, I said, 'Sam, I just don't need people like you; get the hell out,' and he turned around and left."
>
> (Appendix, p. 281)

own testimony was to the effect that he fired the deputy as a result of the statement of disloyalty which the Sheriff inferred from McCollum's admission of having voted the straight Democratic ticket. The right to vote as an exercise of the First Amendment freedom of speech is as obviously protected Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506 (1964), as is the freedom of political belief and association and the uninhibited expression of those freedoms. Board of Education v. Barnette, 319 U.S. 624, 87 L.Ed. 1628 (1943). It is dangerously naive for anyone to contend that the discharge of McCollum was anything other than a political decision by his immediate superior. The only distinction between the punitive reflex of Stahl ridding himself of his deputy and the wholesale dismissal of Republican employees of the Cook County Sheriff's Office in the Elrod case is the relative scope of infringement of constitutional rights which those two actions involved. Petitioners readily admit that the terms of their employment within the Sheriff's Office created at

most a tentative status which Stahl had the power to change as he saw fit, including the power of summary dismissal. That is not to say that such a dismissal at will is proper where the basis for the action collides head-on with the exercise of a constitutionally protected right, and Petitioners can find no authority in Elrod or any other pronouncement by this Court which says otherwise.

A secondary conflict between this Court's holding in Elrod and what the Fourth Circuit said in McCollum grows out of an examination of the issue of status of the affected employee. The Appeals Court appeared preoccupied with the need to make the deputy sheriff a policy-making functionary of the department, as if this factor alone could justify the jury concluding that the Sheriff was not acting arbitrarily in firing McCollum, but was rather implementing internal control over his office by removing an official who did not share the Sheriff's own political ideals. To the extent that such an endeavor is a proper function of

the Appeals Court,[4] this approach does have some support in Elrod: "There is also a need to insure that policies which the electorate has sanctioned are effectively implemented. That interest can be fully satisfied by limiting patronage dismissals to policy-making positions." 427 U.S. at 372. If the "test of dischargeability" 579 F.2d at 874 identified by the Appeals Court is dependent upon a finding that McCollum was in some way involved with shaping policy of the department, the burden of demonstrating that involvement rested with Respondent, as mitigating

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[4] The decision below only hypothesizes as to what evidence there may have been at trial on the details of McCollum's duties and responsibilities within the department which would contribute to the determination as a matter of law whether the deputy was the alter ego of the Sheriff, a point which is asserted without factual basis at 579 F.2d 873. The trial court was in a far superior position to make that determination since it heard the evidence and was intimately familiar with the contentions of the parties at the time instructions were given to the jury, and what legal issues arose from the evidence.

evidence against a prima facie showing of discharge in retaliation for voting "incorrectly." Unfortunately, this Petition cannot deal to any great extent with the trial record which is not now before this Court. Suffice to say that Petitioners represent that all of the evidence on this question tended to show that McCollum was employed as a process server and jail guard, and had no input or responsibility whatsoever in the formulation or execution of the policies of the Mecklenburg County Sheriff's Department. That was a job which Stahl reserved to himself and a few close associates.

The analysis by the Appeals Court represents a boot-strap effort to legitimatize conduct which has been the subject of frequent discussion and consistent condemnation by not only this Court but the Fourth Circuit as well. Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed. 2d 811 (1968); Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.2d 570 (1972); Janetta v. Cole, 493 F.2d 1334 (4th Cir. 1974). The true teaching of Elrod is that the rationalization of the political patronage

system as utilized in Cook County, Illinois was insufficient to justify the substantial encroachment on First Amendment freedoms which those patronage dismissals represented. The idiosyncratic act of Sheriff Stahl in response to the simple expression of a different political ideology by his deputy is as fatally chilling of constitutional prerogatives, and for the same reasons should not be tolerated. The verdict of the jury was not the result of unenlightened judicial guidance by the District Court, and this Petition should be granted in order to affirm that judgment.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals.

No. 77-1136

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

EVERETT A. McCOLLUM and
IRVIN RAY CRIST,

Appellees,

v.

DONALD W. STAHL, IN HIS CAPACITY AS SHERIFF OF MECKLENBURG COUNTY AND INDIVIDUALLY,

Appellant.

Argued February 8, 1978 Decided July 19, 1978

Before BRYAN, Senior Circuit Judge, RUSSELL and WIDENER, Circuit Judges.

Albert V. Bryan, Senior Circuit Judge:

Reversal is sought by Donald W. Stahl of judgments against him, a County Sheriff of North

Carolina, in favor of Everett A. McCollum for $65,000 and of Irvin Ray Crist for $15,000, as damages for Stahl's discharge of them as his deputies. Both awards are predicated on his alleged invasion, under color of State law, of their civil rights, McCollum for not voting for him, Crist for reproving him for firing McCollum. 42 USC 1983. We reverse for procedural errors at trial.

Plaintiffs declare on the defendant's termination of them as incursions upon their rights of free speech and due process of law, as well as a breach of the law of North Carolina. 42 USC 1983; First and Fourteenth Amendments; N.C.S.G. §163-217. Viewed most favorably for the plaintiffs, the evidence established these facts:

During his term of office as Sheriff of Mecklenburg County, expiring the first Monday in December, 1974, Stahl had appointed McCollum and Crist as his deputies. He was reelected on November 4, 1974 for another four years. The next day the Sheriff called McCollum into his office and asked him, "Sam, is it true that you pulled a straight Democratic lever?", meaning he voted against Stahl, a Republican, for Sheriff. When the deputy

replied, "Yes, Sir", Stahl responded, "Sam, I just don't need people like you, get the hell out". This was McCollum's discharge.

Soon afterwards, on learning of the separation of McCollum from the force, Crist went into the Sheriff's office and inquired if it was true that McCollum had been discharged by Stahl "for allegedly voting Democratic, allegedly voting against you?" Acknowledging it, the Sheriff said, "I don't want to hear another word from you", and added that if Crist wished to keep his job he should leave the office. Crist's recollection is this: "I told the Sheriff I was a grown man accountable for my own actions, and I can't be threatened with my job and if he wanted to fire me that was his prerogative. He told me I was fired". A brief physical scuffle ensued when Crist refused to leave and to surrender his identification card and other police property.

For McCollum's severance the Sheriff was accused of a violation of the North Carolina Voter Intimidation Statute, convicted and fined. Voter Intimidation Act NCGS §163-271. As a result McCollum was reinstated and given back pay on February 3, 1975. He remained in office until April 23, 1976,

when he resigned to accept employment with the fire department in the City of Charlotte.

At trial both plaintiffs gave evidence of damages, monetary and otherwise, incident to their dismissals by the Sheriff.

The Crist Case

Counsel have stipulated that this case went to the jury, as to Crist, on the following questions and that on them the following answers were returned:

"1. Did the defendant wrongfully discharge:

"(b) The Plaintiff Crist"

"ANSWER: No

"2. If so, what amount of damages therefor should the Defendant pay:

"(b) To the Plaintiff Crist"

"ANSWER: [no figure inserted]

"3. Was the discharge of either or both the Plaintiffs maliciously, wantonly or oppressively done:

"(b) As to the Plaintiff Crist"

"ANSWER: Yes

"4. If so, what amount, if any, should the Defendant pay as punitive damages:

"(b) To the Plaintiff Crist"

"ANSWER: $15,000"

Manifestly, the jury found no liability of Sheriff Stahl for removing Crist, but nevertheless assessed Stahl with damages. Thereupon the defendant sought dismissal of the Crist claim. The motion was denied. The District Judge observed that while the verdict was inconsistent, this could have been due to his failure to instruct that the jury should not answer the subsequent questions if the first one was not answered in favor of the plaintiff. Over Sheriff Stahl's objection the jury was sent back to reconsider its answers and reappeared with the following responses:

"1. Did the Defendant wrongfully discharge:

"(b) The Plaintiff Crist?

"ANSWER: Yes

"2. If so, what amount of damages therefor should the Defendant pay:

"(b) To the Plaintiff Crist"

"ANSWER: $3,750.00

"3. Was the discharge of either or both Plaintiffs maliciously, wantonly or oppressively done:

"(b) As to the Plaintiff Crist?

"ANSWER: Yes

"4. If so, what amount, if any, should the Defendant pay as punitive damages:

"(b) To the Plaintiff Crist"

"ANSWER: $3,750.00

Appellant Stahl now assigns error to the resubmission of the questions to the jury, contending that since its first response was altogether dispositive of Crist's claim, the second answers were meaningless. The remaining questions did not go to the determinant issue -- liability. They were surplusage, to be disregarded as no longer having place in the litigation. When the jury found no unlawfulness the case was over; final judgment should then have gone for the defendant.

Of course, the taking of a special verdict was appropriate, FRCiv.P 49, but the resubmission was procedurally impermissible. At the time of the recommitment there was before the court a decisive verdict, an unequivocal finding of no wrongful conduct by Stahl.

Moreover, this is confirmed by the answer to the immediately following question, 2(b), refusing Crist compensatory damages. These excusals of Stahl were not oversights or misunderstandings. The jury was not unfamiliar with the procedure --

not to answer in damages if liability was not found -- for it had exhibited this knowledge in McCollum's case.

The inescapable implication of the remand by the trial court was that nothing was amiss in the computation of damages, but that the award demanded justification. Thus the remand of the questions to the jury was tantamount, in its effect, to a direction to the jury to find liability in order to warrant the award of damages.

Finally, as a matter of law the return of the Crist questions was not allowable. The initial submission was under FRCiv.P 49(a). It does not provide for a resubmission as does Rule 49(b). The point is emphasized in Griffin v. Matherne, 471 F2d 911, 917 Fn. 6 (5 Cir. 1973) with the notation:

> "6. Rule 49(a) unlike 49(b) does not provide for resubmission. Under Rule 49(b) the jury returns answers to special interrogatories and a general verdict. To enable it to perform this dual function, the former primarily a factual undertaking and the latter an application of the law to the facts, the jury must be fully charged, and the rule itself

> provides for reconsideration by the jury or for new trial if there is inconsistency between one or more special answers and the general verdict. Rule 49(a), under which the jury's function is solely factfinding with only such instruction as necessary for it to discharge that function, does not provide for jury reconsideration of inconsistent answers."

Again, in Halprin v. Mora, 231 F2d 197, 200 (3 Cir. 1956), a parallel to the Crist case, the Court gave judgment for defendants upon the jury's ascertainment in a special verdict of no negligence on the part of either of the two defendants but at the same time including answers fixing damages for the plaintiff.

Even under Rule 49(b) -- in which interrogatories as well as a general verdict are simultaneously laid before the jury -- the proper disposition is a judgment for the defendant. This was explained in Ninnicht v. Evans, Inc., 477 F2d 133, 135 (5 Cir. 1973), with the posture of the proceedings akin to that presently under consideration. There, on the first and second interrogatories, the jury found no negligence or unseaworthiness on the part

of the defendants, but in the last answer it found damages. On appeal, the District Court's judgment for the defendants was affirmed, the Court commenting:

> "We are of the opinion that those findings left the District Court with no room to adopt any other course. In the absence of unseaworthiness or negligence, damages could not be awarded. The jury should not have responded to Interrogatory No. 11 [fixing damages]. The fact that it mistakenly did so could not change the answers to the prerequisite questions, upon which any damages at all had to live or die."

The McCollum Case

While the two claims were submitted together on questions to the jury, now to avoid repetition the questions and answers just discussed in the Crist case are omitted, and only those in the McCollum case follows:

"1. Did the defendant wrongfully discharge:

(a) The plaintiff McCollum?

ANSWER: Yes

"2. If so, what amount of damage therefor should the defendant pay:

(a) To the plaintiff McCollum"

ANSWER: $50,000.00

"3. Was the discharge of either or both plaintiffs maliciously, wantonly or oppressively done:

(a) As to the plaintiff McCollum?

ANSWER: Yes

"4. If so, what amount, if any, should the defendant pay as punitive damages:

(a) To the plaintiff McCollum?

ANSWER: $15,000.00"

After all of the evidence had been adduced for each party, the plaintiffs moved for directed verdicts. That for Crist was denied, but McCollum's was granted. Thereupon, the jury was instructed to find for McCollum on the issue of whether he was wrongfully discharged.

This was error. Sheriff Stahl had included among his defenses, and had requested an instruction to the jury, that in the peculiar circumstances he had the right to terminate McCollum at any time and this without offense to the freedom of speech or other civil privileges of McCollum. Stahl was entitled to have the jury decide whether McCollum was subject to be released at the will

of the Sheriff because of the character of McCollum's position, the nature of its responsibilities and his identification with the Sheriff.

To begin with, the General Statutes of North Carolina, §153A-104 declares:

" . . .

(1) Each sheriff . . . elected by the people has the exclusive right to hire, discharge, and supervise the employees in his office. . . ."

Without a contract of any kind, the deputies were chosen only for a year during the Sheriff's term. Each took an oath of office annually at the beginning of the calendar year of his service. They were beneficiaries of his political patronage, and actual loyalty to the Sheriff was one of the prerequisites of an appointment. However, if he was not simply a menial employee or not merely "a nonpolicymaking, nonconfidential government employee" he was dischargeable at will. Elrod v. Burnes, 427 US 347, 375 (1976) (Mr. Justice Stewart concurring).

In determining the deputy's status vis-a-vis this test of dischargeability, the jury could consider that his relationship to him was so

close that illegal conduct on the deputy's part could expose the Sheriff to civil liability. Indeed, in law he occupied a status of alter ego of the Sheriff officially. The jury could well have believed McCollum acted in a confidential capacity with the Sheriff that demanded loyalty of him. This might even have been though by the jury to include joint decision-making. Thus, the deputy could have appeared to the jury as a policy-maker, particularly if the jury saw his duties unlimited.

At all events, appellant should have had the benefit of the jury's deliberation upon this evidence in determining whether Stahl should be exonerated of wrongfulness in discharging McCollum. It was not a resolution to be made by the trial judge. This is the teaching of Elrod v. Burnes, 427 US at 368. The Court there emphasized that the determination of the quality of an employee's position is a matter of proof. To this point the Court cited Illinois State Employees Union v. Lewis, 473 F2d 561, 574 (1972), cert. denied 1973, wherein the Seventh Circuit stated:

> "Plaintiffs properly do not challenge the public executive's right to use political philosophy or affiliation as one criterion in the selection of policy-making officials.

> Moreover considerations of personal loyalty, or other factors besides determination of policy, may justify the employment of political associates in certain positions. It is difficult to believe, however, that any such justification would be valid for positions such as janitors, elevator operators or school teachers. Thus, again justification is a matter of proof or at least argument directed at particular kinds of jobs." (Accent added.)

In fine, the jury should have been told, under appropriate instructions of the court, to evaluate the relationship between Sheriff Stahl and deputy McCollum so as to adjudge whether the discharge was illegal. The peremptory direction to the jury deprived Stahl of his entitlement.

For the errors at trial discussed infra, the judgment in favor of Crist and against Stahl will be vacated and final judgment will here be entered for Stahl, and the judgment in favor of McCollum and against Stahl will be reversed and that action remanded for a new trial.

VACATED IN PART WITH FINAL JUDGMENT and REVERSED IN PART and REMANDED FOR NEW TRIAL.

APPENDIX B

Opinion of the District Court

United States District Court
W.D. North Carolina
Charlotte Division

Oct. 14, 1976

EVERETT A. McCOLLUM and IRVIN RAY CRIST,
Plaintiffs,

v.

DONALD W. STAHL, in his capacity as Sheriff of Mecklenburg County and individually, Defendant.

No. C-C-74-259

JUDGMENT

McMILLAN, District Judge.

This case was tried before a jury and on the 18th day of May, 1976, consolidated verdicts were entered as follows:

"1. Did the defendant wrongfully discharge:

(a) The plaintiff McCollum?

ANSWER: Yes

(b) The plaintiff Crist?

ANSWER: Yes

"2. If so, what amount of damages therefor should the defendant pay:

(a) To the plaintiff McCollum?

ANSWER: $50,000.00

(b) To the plaintiff Crist?

ANSWER: $3,750.00

"3. Was the discharge of either or both the plaintiffs maliciously, wantonly or oppressively done:

(a) As to the plaintiff McCollum?

ANSWER: Yes

(b) As to the plaintiff Crist?

ANSWER: Yes

"4. If so, what amount, if any, should the defendant pay as punitive damages:

(a) To the plaintiff McCollum?

ANSWER: $15,000.00

(b) To the plaintiff Crist?

ANSWER: $3,750.00"

The court has delayed entry of judgment on the possibility that there might be a settlement, but none has been forthcoming. The recent Supreme Court decision of Elrod v. Burns, 44 L.S. 5091 (S.Ct. 1976), appears to confirm the correctness of the original submission to the jury. The court finds nothing unreasonable in the verdict, which reflects an opinion on the part of the jurors that violation of constitutional rights merits substantial damages and should not be encouraged.

Opinion of the District Court

The motions of the defendant to set aside the verdict and for judgment in his favor notwithstanding the verdict are denied.

IT IS THEREFORE ORDERED:

1. That the plaintiff Crist recover of the defendant $7,500.00 and the costs of this action.

2. That the plaintiff McCollum recover of the defendant the sum of $65,000.00 and the costs of this action. By and with the consent of the plaintiff McCollum, execution upon this judgment is suspended for thirty days from the entry of this judgment, and if, within that period of time, the defendant pays to the plaintiff McCollum the sum of $15,000.00 and the costs of this action, this judgment shall be deemed satisfied as to the plaintiff McCollum; if such payment is not made the judgment for $65,000.00 and the costs will be in full force and effect.

APPENDIX C

STATUTE

NORTH CAROLINA GENERAL STATUTES

§163-271 - Intimidation of voters by officers made misdemeanor.

It shall be unlawful for any person holding any office, position, or employment in the State government, or under and with any department, institution, bureau, board, commission, or other State agency, or under and with any county, city, town, district, or other political subdivision, directly or indirectly, to discharge, threaten to discharge, or cause to be discharged, or otherwise intimidate or oppress any other person in such employment on account of any vote such voter or any member of his family may cast, or consider or intend to cast, or not to cast, or which he may have failed to cast, or to seek or undertake to control any vote which any subordinate of such person may cast, or consider or intend to cast, or not to cast, by threat, intimidation, or declaration that the position, salary, or any part of the salary of such subordinate depends in any manner whatsoever, directly or indirectly, upon the say in which subordinate or any member of his family casts, or considers or intends to cast, or not to cast his vote, at any primary or election. Any person violating this

section shall be guilty of a misdemeanor and punished by fine or imprisonment, or both, in the discretion of the court. (1933, c. 165, s. 25; 1967, c. 775, 2.1.)